No. 20474

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JUNE E. BERRY, as the personal representative of the Estate of JOHN H. BERRY, deceased,

Appellant,

vs.

PACIFIC SPORTFISHING, INC., A. O. LEAVITT and F. E. McEWEN, sole owners of the boat "FISHERMAN",

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEES' REPLY BRIEF.

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Counter-Statement of the Case.

Appellant's brief obscures the fact that his *own* actions precipitated the judgment against him. Appellant's contentions misconstrue two points: First, the relationship of opposing counsel in an adversary system, and second, the relationship of each counsel to his own client. Furthermore, appellant's brief omits essential facts. Before reviewing those facts and the applicable law appellees touch on a procedural point.

A. The Procedure in the District Court.

Appellant moved in the District Court for an order permitting her to file an amended claim. Petitioners filed a memorandum opposing the filing of the amend-

ed claim, supported by an Affidavit of Dan Brennan, petitioners' counsel. [Ex. A attached to Petitioners' Memorandum.] After oral argument on appellant's motion to file an amended claim, Judge Crary, at the suggestion of appellant, ordered the amended claim be filed, that petitioners be deemed to have orally moved to dismiss the amended claim, and that petitioners' oral motion to dismiss the amended claim be granted. This procedure in the District Court was agreed to by all counsel [Tr. pp. 22-26] and was consistent with General Admiralty Rule 44, which provides:

> "In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice."

As the Court stated:

> ". . . what we are trying to do here . . . is to get this question before the appellate court." [Tr. p. 23, lines 21-23.]

Petitioners' oral motion to dismiss the amended claim was in legal effect an "Exception" and therefore proper under Supreme Court Admiralty Rule 27. See *McAllister Lighterage Lines, Inc. v. Pennsylvania R. Co.*, 99 F. Supp. 648 (E.D.N.Y. 1951), holding that an "exception" is the proper procedure in admiralty to affect the dismissal of a pleading barred by the statute of limitations.

B. Appellees' Review of the Facts.

This appeal involves a reasonably simple basic issue. That issue is whether or not the appellees' counsel had a duty to voluntarily advise the appellant's counsel of ap-

pellant's rights or remedies. The appellant has not and *cannot* accurately assert that the appellees' counsel purported to give any advice to the appellant or that the appellant solicited his advice.

The decedent died on July 12, 1962. On July 11, 1963, appellant filed suit in the State Court. The delay in filing is unexplained. Delaying again, the appellant waited an additional six months and nine days to serve the complaint and summons. After service, appellees engaged attorneys to defend their interests. The answer of the appellees denied liability and set up, among several affirmative defenses, the prospective filing of a petition for limitation of liability in the United States District Court. The answer specifically cited the Limitation of Liability Act which contains a six-months Statute of Limitations for the filing of such a petition. 46 U.S.C. §185. Had the appellees' attorney read the act specifically cited, he would have discovered that the petition might be filed as late as July 20, 1964. The petition was in fact filed on July 16, 1965, and promptly served upon the appellant.

The complaint, served six months nine days after its filing, was the first written notice of claim defendants received from plaintiff. It is apparent plaintiff's delay in filing the complaint and plaintiff's delay in service of the complaint combined with the six months allowed by 46 U.S.C. §185 for filing a limitation proceeding to allow filing the limitation proceeding *after* the death action under DHSA was time barred. Appellees note further that not until May 25, 1965, nearly a year after the death action was time barred under DHSA, was appellant appointed administratrix, a prerequisite to suit under DHSA. 46 U.S.C. §761.

The limitation proceeding was an appropriate defense not only to a timely filing under DHSA but also against the possibility plaintiff *would prevail* before a jury on her state court cause of action. (Under normal procedure, the state court action would have proceeded after petitioners obtained from plaintiff a stipulation that plaintiff would abide by the limitation proceeding.)

Appellees' answer in the State Court suit was served February 5, 1964, at which point plaintiff had five months and seven days remaining to file an action under DHSA.

Appellee's Pre-Trial Conference Statement filed on May 8, 1964, again stated their intention to file a petition for limitation of liability. Plaintiff then still had two months and four days to file under DHSA. Instead, the time bar was allowed to run.

The lower court held that granting everything alleged in the amended claim Berry was time barred and that petitioners were not estopped to raise nor had petitioners waived the Statute of Limitations.

Reading the transcript of the oral argument, it is apparent the District Court had a precise view of the matter. Appellant had failed to invoke the jurisdiction of the State Court and was too late in the Federal Court.

The Court (addressing appellant's counsel):

> "There is nothing in your motion to amend that indicates that the statute of limitations would not be tolled or that it would not be barred. . . ." [Tr. p. 7, lines 14-16.]

"I can't go along with you on the proposition that they are estopped where the state court had no jurisdiction, and everything over there was a nullity." [Tr. p. 13, lines 13-15.]

"There was jurisdiction in all the other cases you are citing for estoppel. There was jurisdiction in all of those.

Mr. Margolis: That is correct, your Honor. . . .

So the question before this court is whether the principles which are cited in the estoppel cases are applicable in a case in which the court does not have jurisdiction.

The Court: I don't think it is." [Tr. p. 14, lines 8-21.]

The Court: Mr. Margolis, I have read all of that. I will tell you again I have read all your memoranda and I have read your cases. I know exactly what you state about the fact in the state court there was a pre-trial in which there was an obligation to disclose and so forth. I have that in mind." [Tr. p. 17, lines 5-10.]

The Court then dismissed the amended claim.

In hiring an attorney to defend their interest, the appellees had no obligation to require that their attorney should take it upon himself to assist both sides of the controversy. The appellees' attorney was not hired to act as arbitrator, judge, or teacher. His job and his responsibility was to develop those facts favorable to the defense and to present all available legal defenses to the best of his ability. Nothing more was done.

Appellant chooses to ignore the fact that her present difficulty stems from the failure of her attorneys to prepare her case. The appellant refers to the fact that at

the pre-trial hearing in the Superior Court her attorney was not advised that the Court had no jurisdiction. A very slight amount of diligence on the appellant's behalf would have eliminated the appellant's difficulties. The case reached the pre-trial state upon the initiative of the appellant. An attorney represents that his case is ready for trial when he asks for a pre-trial. The appellees had a right to assume, as they did in this instance, that the appellant's attorney has reasons to believe his State Court case could be won. The appellant's attorney was an experienced lawyer, L. W. Johnston. According to Martindale Hubbell Law Directory, Vol. I, page 166, Mr. Johnston was born 1918 and admitted to the bar in 1945. He obtained an AB Degree from the University of California and an LL.B. Degree from the Hastings College of the University of California.

Appellant's appeal is predicated in part upon the claim that appellees' attorneys were "knowledgeable." Appellant chooses to ignore the fact that his attorney appears to have had little or no interest in the case. The appellant states that the appellees "well knew" that the appellant was in the wrong court, and that the court had no jurisdiction. This is simply not true. The most that can be said is that the appellees hoped to prove or disprove certain facts but know from experience that litigation is fraught with surprises. Had the appellees well known as appellant claims that there was no possibility of appellant's securing a judgment in the State Court, there would have been no occasion for filing a petition

in the District Court or posting a bond in excess of $50,000.00.

The appellant's former attorney has come forth with no information or assertion that the appellees affirmatively misled him or that he relied in any degree upon the appellees' attorney for guidance.

In retrospect it is apparent appellant did not have a clear understanding of his rights or remedies. The appellant would ask that the Statute of Limitations applicable to this case be enlarged because her attorney remained ignorant for approximately two and one-half years. Pursuing the appellant's own theory, she would have no case at all, had the appellees not retained "knowledgeable" counsel but defended their own interest. Appellant would have no case at all according to her theory if the appellees had engaged an attorney with no more knowledge nor any greater industry than the appellant's attorney. Not by any logic can appellant's rights be enlarged because appellees engaged a "knowledgeable" marine firm.

APPELLEES' ARGUMENT.

I.

On the facts of this case, appellees are not barred by estoppel or waiver from invoking the statute of limitations.

II.

Under *Burnett v. N. Y. Central Ry. Co.,* appellant's California State Court action did not toll the statute of limitations of the Death on the High Seas Act.

III.

Appellant's failure to file a libel in admiralty within the two year period extinguished her cause of action.

IV.

The policy of the law is (1) to apply the limitation of liability act liberally in favor of shipowners; and (2) not to apply an estoppel to assert a time bar when a party is represented by counsel.

I.

On the Facts of This Case, Appellees Are Not Barred by Estoppel or Waiver From Invoking the Statute of Limitations.

The appellees had no obligation to file a petition for limitation of liability. They chose to do so to guard against the possibility of an adverse judgment in the State Court. This was the sole purpose of the petition. The appellees chose not to file the petition with the posting of a bond in excess of $50,000.00 and the attending expense until the last week of the six-months' period. Had the petition not been filed, the State Court proceeding would have ultimately gone to trial. In the ordinary course of events it would have developed that death occurred on the high seas and that the State

Court was without jurisdiction. With or without a finding of negligence, the case would have been dismissed. Appellant would have this court hold that it is the duty of the defense attorney to voluntarily advise the plaintiff that the plaintiff cannot win the case it is asserting, that it can only succeed on a different tack. The appellees believe that it is the duty of defense counsel to take all appropriate action to defend a client, that its first and foremost duty is to protect its client's interests. This carries a corresponding burden of refraining from taking affirmative action which will advance the plaintiff's case. The appellees contend that not only did their attorney have no obligation to voluntarily advise the plaintiff but that on the contrary their attorney's duty was to refrain from doing so.

This is a characteristic of the American judicial system. In the course of ordinary litigation attorneys will frequently foresee strategy that could be adopted or tactics that could be pursued by the opposition that would be more effective than the approach being taken. Occasionally, an attorney will be aware that if a certain question were put to a particular witness or to a client that the answer would be favorable to the opponent's case. An attorney will frequently foresee that a certain line of questioning can only serve to weaken the opposition's case. It is not the duty, much less the practice, for an attorney to voluntarily approach the other side and give advice as to how the opponent's case can be more effectively presented. For example, in this case the appellant's attorney is not pointing out that it is apparent the appellant's prior attorney neglected to take appropriate action and should be sued in a malpractice action to recover whatever losses the appellant

may have suffered. Appellant refers to the doctrine of estoppel as a substitute for the indifference or lack of industry on the part of appellant's prior attorney.

The appellant did not in this instance solicit any assistance from the appellees. Had the appellant done so and been misinformed by the appellees, we would be dealing with an entirely different case. Had the appellant done so, appellees concede that it would have been appellees' duty to either refrain from responding or if responding, to do so honestly and with integrity. Appellant was content to pursue its rights in its own way and in accordance with its own vision. The appellees merely met its attack and invited no others.

Estoppel requires a *misrepresentation* which induces reliance. Appellees made no misrepresentation to appellant. There was thus no "reliance" on the non-existent misrepresentation.

This is different from the *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 3 L. Ed. 2d 770 (1959) case relied on by appellant where the defendant *had misstated* to the plaintiff that the latter had seven years within which to file suit. *Glus, supra,* Footnote 2, at 771.

What is involved here is not misrepresentation but rather whether defendants had a duty to advise the plaintiff as to the law, the breach of which induced reliance by appellant. There is no such duty. Appellant's counsel, charged with knowledge of the law, *Kunstman v. Mirizzi,* 234 Cal. App. 2d 753 (1965). could not have "relied" on appellees to advise him. There is, thus, no basis for estoppel.

Litigation is as Judge George B. Harris of the Northern District of California states "intellectual warfare".

Wolverton Oil Co. v. Shell Oil Co. (N.D. Cal. Civil No. 43355), Law & Motion Calendar, Reporter's Transcript, page 56.

If the lower court here is reversed, appellees are placed in the anomalous position of having foisted upon them a higher duty to advise opposing counsel than opposing counsel has to correctly and promptly analyze, research and investigate his own lawsuit. There is no duty to advise opposing counsel.

In an early federal case, *LaPorte v. U. S. Radium Corp.,* 13 F. Supp. 263 (D.N.Y. 1935), which declined to apply an estoppel, the District Court stated:

> ". . . it cannot be said to be ordinarily any part of duty to apprise an adversary of his rights. . . ." (at 274.)

Appellees rely on California Court Rule 210(c). Rule 210(c) is a rule prescribing duties of attorney's *to the court* and cannot be deemed to demand unsolicited disclosures or assistance to opposing counsel. Rule 210(c) is at most a formalized guideline for handling pretrial conferences and was complied with in the state court case.

A recent California Case sheds light on the question. In *Kunstman v. Mirizzi,* 234 Cal. App. 2d 753 (1965) plaintiff filed a complaint for personal injury more than a year after the accident. Plaintiff had been represented by an out-of-state attorney during pre-filing negotiations with defendant's underwriter. The underwriter in conducting negotiations had stated "this is a case that we will settle." Plaintiff contended the underwriter "lulled her attorney into a sense of security" causing him to "defer the filing of a complaint".

Plaintiff was dismissed and the dismissal was affirmed. The court stated at 757:

> "Statutes of limitation are favored by the law . . . and the law does not favor estoppels, *particularly where the party attempting to raise the estoppel is represented by an attorney at law.*" (Emphasis added.)

The District Court of Appeal quoted approvingly the language of California Supreme Court in *California Cigarette Concessions, Inc. v. City of Los Angeles,* 53 Cal. 2d 865 (1960) at 871:

> ". . . '[W]here one acts with full knowledge of plain provisions of law, and their probable effect upon facts within his knowledge, *especially where represented by counsel,* he can neither claim (1) ignorance of the true facts or (2) reliance to his detriment upon conduct of the person claimed to be estopped, two of the essential elements of equitable estoppel.' "

Answering the contention that plaintiff's out-of-state attorney did not know the California Statute of Limitations, the Court stated plaintiff:

> "was being protected by an attorney, *who is charged with knowledge of the law. . . .*" 234 Cal. App. 2d 753 at 758. (Emphasis added.)

See also *California Cigarette Concessions v. City of Los Angeles,* 53 Cal. 2d 865 (1960) at 870 (plaintiff time barred, estoppel denied):

> "It must be presumed that plaintiff's attorney knew of the charter provision. . . ." (A time bar provision of the Los Angeles City Charter.)

In short, one charged with knowledge of the law, such as a plaintiff acting through an attorney, cannot claim a reliance on opposing counsel's failure to advise her attorney and thus cannot make out a claim of estoppel.

What was said in *Aetna Life Ins. Co. v. Moyer,* 113 F. 2d 974, 981-982 (3 Cir. 1940) is particularly applicable here:

> "The appellee urges that the insurer's conduct in the instant case, through its agent Bichner, deprives appellant of the right to plead the statute of limitations. . . . It appears of record in this case that the beneficiary sought and obtained independent counsel and advise with respect to her rights under the policies several years before the statute of limitations had run against any of her claims. Her action, therefore, in not pressing timely her claim for the monthly benefit payments must be deemed to have been taken advisedly; and, thereby, she is bound."

A more recent case in point is *City of Los Angeles v. Industrial Acc. Com.,* 63 A.C. 258 (1965). An employee of the city was injured. He filed for workmen's compensation after the statute of limitations of Labor Code §5405 had run. Plaintiff had deferred a timely filing relying on erroneous advice from agents of the city that such a filing would be useless.

The court in refusing to apply an estoppel adopted the rule that

> ". . . an estoppel does not bar the city from relying upon the statute of limitations *if the nature of the conduct* or advice of the city *is reasonable* when given." (At p. 265, emphasis added.)

Appellees submit their conduct, viewed in the light of litigation realities, *was* reasonable. Counsel simply do not advise opposing counsel of adverse provisions of law. They do not call up opposing counsel and advise him of new and additional theories under which he might sue. Plaintiff's attorneys in personal injury cases do not volunteer information on prior or subsequent injuries. Prosecutors do not volunteer impeaching material for defense attorneys to use against the prosecutor's witnesses. In divorce cases the husband's attorney does not advise the wife's counsel of the husband's infidelities to facilitate the wife's bringing suit. That would be *unreasonable* and make a wreckage of the carefully protected attorney-client relationship. A lawyer who aided opposing counsel would soon lose his own clients. This is a hard case but the fault lies with appellant's predecessor counsel whose professional zeal and preparatory vigor fell short of the mark. Berry's widow hired her present counsel's predecessor to protect her rights. She did not hire appellees' counsel. And it is unreasonable to burden appellees' counsel with the responsibility to protect, not only their own client, but the opposition as well.

Appellant relies on *Weade v. Trailways of New England, Inc.*, 325 F. 2d 1000 (D.C. Cir. 1963); *Zielinski v. Philadelphia Piers, Inc.*, 139 F. Supp. 408 (E.D. Pa. 1956) and *Denver v. Forbes*, 26 F.R.D. 614 (E.D. Pa. 1960). They do not help appellant.

Weade reversed a motion for summary judgment on the ground that "substantial issues of fact and law" remained in issue. The case decided no rule of law applicable hereto. In any event in that case the court below to which the case was remanded "to make findings

of fact and conclusions of law . . . and to enter judgment as it may then be advised" had jurisdiction in the premises and the actions inspiring the plea for estoppel had occurred in that court. Note the distinguishing factors here where the activity appellant complains of occurred in the state court which never obtained jurisdiction. In the *Weade* case we further note plaintiff had sued party A whereas the negligent party was A's lease and there was a common underwriter. The estoppel was to deny *agency*. The same is true of the *Zielinski* case upon which appellant further relies.

Denver v. Forbes, 26 F.R.D. 614 (E.D. Pa. 1960) cited by appellant is similar. Plaintiff sued the mother of a negligent driver. The names were the same except for a middle initial. After the statute ran plaintiff was allowed to amend to name the proper party fully. This case is hardly relevant.

The *Zielinski, Denver* and *Weade* cases involve suits against the wrong party where that party had a close relation with the correct party and both the wrong party and the correct party had the same insurance underwriter. The named defendant in each case, by giving only general denials in its pleadings, had failed to fully alert the plaintiff *of certain facts, i.e.* that he had sued the wrong party, facts which were available only to the party withholding the information. In all three cases the court had jurisdiction over both the subject matter and the persons involved. It could, therefore, estop those persons in the face of incomplete disclosure *of facts* in connection with its own proceedings. *Here the state court is not the court where estoppel is sought. Moreover, the state court had no jurisdiction in the premises and would, therefore, be powerless to act or to apply*

any estoppel. Furthermore, unlike *Zielinski, Denver* and *Weade* there has not been nor does appellant claim an incomplete factual disclosure here. There has merely been no volunteering of legal points to Berry's attorney. As we have seen, there is no duty to advise opposing counsel, who is charged with knowledge of the law. Failure to advise opposing counsel, therefore, cannot lead to an estoppel or waiver.

II.

Under Burnett v. New York Central Ry. Co. Appellant's California State Action Did Not Toll the Statute of Limitations.

In *Burnett v. New York Central R. Co.,* 380 U.S. 424, 13 L. Ed. 2d 941 (1965) relied upon by appellant plaintiff began a state court action in Ohio for personal injury under Federal Employers' Liability Act which gave *concurrent* jurisdiction to both the state and federal district courts. The Supreme Court notes:

> *"The Ohio Court had jurisdiction of the action and respondent was properly served. . . ."* (At pp. 425, 943, emphasis added.)

However, the Ohio action was dismissed because venue was improper under the Ohio law. The injury had been March 17, 1960. The state action was commenced March 15, 1963. The state court action was dismissed June 4, 1963, after the limitation period of 45 U.S.C. Section 56 had run. Eight days later plaintiff filed a complaint in the federal court which was dismissed as time barred. The Court of Appeals affirmed. The Supreme Court reversed, holding that an action under a statute, such as FELA giving *concurrent jurisdiction to the state and federal court* is properly "commenced" so as to toll the statute of limitations where the plaintiff files in the

state court and serves defendant notwithstanding improper venue results in the subsequent dismissal in the state forum.

Appellant puts forth two arguments for the application of the *Burnett* rule in this case. He argues (1) that here as in *Burnett* the defect of the state court action could have been waived thus allowing the case to "lead to final judgment"; and (2) that here the state court case could have been "removed" to the law side of the district court and then "transferred" to the admiralty thus allowing the case to "lead to final judgment".

Appellees Answer Each Argument Separately.

1. Argument One.

The foundation of the *Burnett* case is *Herb v. Pitcairn,* 325 U.S. 77, 79, 89 L. Ed. 1483, 1488 (1945) which held that:

> ". . . when process has been adequate to bring in the parties and to start the case on a course of judicial handling which may *lead to final judgment* without the issuance of a new process, it is enough to commence the action within the Federal statute." (Emphasis added.)

Here the state court action could not have "lead to final judgment", since the DHSA unlike the FELA *did not* grant concurrent jurisdiction to the state and federal court.

In *Burnett* the state action defect was venue and waivable. In this case the state action defect was *jurisdiction* and non-waivable since Congress vested the Admiralty Court with exclusive jurisdiction in Death on the High Seas cases. *Wilson v. Transocean Airlines,*

121 F. Supp. 85 (N.D. Cal. 1954); *Higa v. Transocean Airlines,* 230 F. 2d 780 (9th Cir. 1955). The State Court's lack of jurisdiction made it impossible for that case to "proceed to final judgment" within the rule of *Herb v. Pitcairn,* 325 U.S. 77, 89 L. Ed. 1483 (1945) and *Burnett v. New York Central Ry. Co.,* 380 U.S. 424, 13 L. Ed. 2d 941 (1965). Process in the state court was not

> " '. . . adequate to bring in the parties and to start the case on a course of judicial handling which may lead to final judgment without issuance of new initial process. . . .' " (at 426, 944.)

Not enough was done to "commence the action within the federal statute". Thus, the statute of limitations was not tolled.

2. Argument Two.

Appellant further argues the jurisdiction defect of the California action could have been cured by appellees' "removing" the state court action to the Federal District Court and thereafter "transferring" to the admiralty court where it could "lead to final judgment". For this proposition he cites *Delvin v. Flying Tiger Lines, Inc.,* 220 F. Supp. 924 (S.D.N.Y. 1963).

In *Delvin v. Flying Tiger Lines, Inc.,* 220 F. Supp. 924 (S.D.N.Y. 1963) plaintiff brought suit in May of 1963 in a New York state court for a death occurring on the high seas September 23, 1962. The defendant erroneously removed the case to the law side of the Federal District Court.

The District Court decided that since New York Court had not acquired jurisdiction, since jurisdiction for this type of action was vested exclusively in ad-

miralty, the Federal District Court on the Civil side could not obtain jurisdiction by removal. However, *since the statute of limitations had not yet run,* the Federal District Judge transferred the case to admiralty where jurisdiction was proper. The case did not present any statute of limitations or estoppel problem. *Delvin,* of course, is fundamentally different from this case because, unlike *Delvin,* this case was *not* removed.

Actions are not removable *to admiralty* but only to the law side of the District Court which *does not* have jurisdiction for a DHSA case. Had this case been removed from the State Court neither the court the case was *removed from* nor the court the case *was removed to* would have had jurisdiction. The defect would have remained uncorrected. However, had the case been erroneously "removed", it could not have been subsequently "transferred" to admiralty as the appellant argues, citing *Delvin v. Flying Tiger Lines, Inc.,* 220 F. Supp. 924 (S.D.N.Y. 1963). The cases applicable in this circuit on that point are *Higa v. Transocean Airlines,* 230 F. 2d 780 (9th Cir. 1955) and *Wilson v. Transocean Airlines,* 121 F. Supp. 85 (N.D. Cal. 1954). The rule adopted in *Higa,* contrary to *Delvin,* is that the case *cannot be* transferred from the Federal District Court to the Admiralty Court. See *Per Curiam Opinion on Petition for Rehearing,* 230 F. 2d 786. See also *Wilson v. Transocean Airlines,* 121 F. Supp. 85 (N.D. Cal. 1954):

> "Since the Superior Court of California had no jurisdiction to entertain the suit at law for the death of plaintiff's husband, this court could not acquire jurisdiction by removal. The action must therefore be dismissed. . . ." (at 98.)

Consequently, since under no circumstances could the state court action have "lead to final judgment without the issuance of new process", the statute of limitations was not tolled. The *Burnett* case does not permit a contrary conclusion.

III.

Appellant's Failure to File a Libel in Admiralty Within the Two Year Period Extinguished Her Cause of Action.

For a cause of action not known at common law which is created by act of Congress, such as a cause of action under DHSA, the limitation period is a "condition of the right". Expiration of the limitation period extinguishes the causes of action. See *Danzer & Co. v. Gulf & Ship Island R. Co.,* 268 U.S. 633, 69 L. Ed. 1126 (1925) [cause of action under the Transportation Act, 41 Stat. 465]:

> "It is settled by the decisions of this court that the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff." (At 636, 1128.)
>
> ". . . provisions fixing the time within which suits must be brought . . . sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act. . . ." (At 637, 1129.)

It is settled that there was no cause of action at common law for a death on the high seas and the cause of action for such a death is purely statutory. *The Harrisburg v. Rickards,* 119 U.S. 199, 30 L. Ed. 358

(1886); *Wilson v. Transocean Airlines,* 121 F. Supp. 85 (N.D. Cal. 1954); *Higa v. Transocean Airlines,* 230 F. 2d 780 (9th Cir. 1955). Hence, the rule enunciated in *Danzer,* applies to plaintiff herein. This point, that timely commencement of suit under DHSA is a condition of the right, has been litigated in other circuits. See *In re Agwi Nav. Co.,* 89 F. 2d 11 (2nd Cir. 1937) at 12:

> "The statute which creates the right to recover for death on the high seas by wrongful act provides that 'suit shall be begun within two years from the date of such wrongful act.' 46 U.S.C.A §763. In such statutes a specification of a time for bringing suit is not merely a limitation of the remedy, but is a condition upon the right itself."

Batkiewicz v. Seas Shipping Co., Inc., 54 F. Supp. 789 (S.D.N.Y. 1944), at 790:

> "The 'Death on the High Seas Act' gives a right where none existed before. The limitation of time within which to begin suit is a limitation not merely on the remedy alone, but is a condition on the very right to bring the action. In re Agwi Nav. Co., 2 Cir., 89 F. 2d 11, 12. Therefore, if the action is not begun within the time allowed by Sec. 763, the court has no jurisdiction to hear the action."

Petition of United States, 92 F. Supp. 495 (S.D.N.Y. 1950):

> "Since Gussie Dictor's claim was not filed until February 28, 1944, which is more than two years after the date [January 14, 1942] of the alleged wrongful act, the cause of action was extinguished." (At 497.)

". . . the statutory limitation period is not merely a limitation of the remedy, but is a condition on the right itself. The pendency of a limitation proceeding does not stop the running of the statutory time, expiration of which, without the bringing of suit or the filing of a claim in the limitation proceeding, would extinguish the claim." (at 498.)

Moran v. United States, 102 F. Supp. 275 (D. Conn. 1951) at 279:

"It is indeed, authoritatively established in this circuit that the limitation which Congress imposed when it created the right of action afforded by the Death on the High Seas Act was a condition of the right itself,—not merely a limitation upon the remedy."

In this circuit the principle here sought to be applied with respect to the limitation period *has been* applied with respect to filing "in admiralty." In an opinion approved by the Ninth Circuit (see *Higa v. Transocean Airlines,* 230 F. 2d 780 (9th Cir. 1955) footnote 3 at 784), Judge Goodman in *Wilson v. Transocean Airlines,* 121 F. Supp. 85 (N.D. Cal. 1954) states:

". . . in a single sentence the statute creates a right of action, which did not previously exist, and stipulates that the right is to be enforced in the federal courts of admiralty. The provision that enforcement is to be in admiralty is a limitation on the right itself." (At 94.)

Appellees here similarly contend that filing within two years is a "limitation of the right itself".

The Ninth Circuit in *Higa v. Transocean Airlines,* 230 F. 2d 780 (9th Cir. 1955) in affirming the lower

court's dismissal of plaintiff's DHSA cause of action which had been misfiled on the law side of the district court, classified the DHSA as being within the principle that the conditions of a cause of action are found in the statute creating it.

> "We affirm the judgment, since the case is clearly one of the class described in the following language, 233 U.S. at page 490, 32 S.Ct. at page 206, of the Galveston, H. & S. A. R. Co. case, supra. 'Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right.' " (At 786.)

Appellant relies on *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 3 L. Ed. 2d 770 (1959) where the question arose whether estoppel could be applied to prevent the bar of the limitation period in a cause of action created by the FELA. An estoppel was allowed because the statute involved did not show an intent by Congress that the cause of action there provided should lapse if not filed in time.

The language of the statute involved here differs sharply from the FELA statute in the *Glus* case and *does show* an intent by Congress that the cause of action "lapse" at the expiration of the time period. 46 U.S.C. §763 provides:

> "*Suit shall be begun within two years* from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but *after the expiration of such period of two*

> *years the right of action hereby given shall not be deemed to have lapsed* until ninety days after a reasonable opportunity to secure jurisdiction has offerred." (Emphasis added.)

The only exception to a lapse of the cause of action is:

> ". . . unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person or corporation sought to be charged. . . ."

In this case there has been such "reasonable opportunity" to obtain jurisdiction.

The only reasonable construction of the statute is that by enumerating when the cause of action *does not* lapse, the cause of action *does* lapse in all other situations and the cases quoted above support this view.

Appellant's argument that *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 3 L. Ed. 2d 770 (1959), where an estoppel was applied, demands that an estoppel be applied here is erroneous. In *Glus* (1) a statute was involved which did not preclude expiration of the cause of action after the time had run; and (2) the facts were different. In the *Glus* case the defendant had " 'misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time' ". *Glus, supra,* footnote 2, at 771. See District Court Opinion Below, 154 F. Supp. 863 at 864.

Here there has been no misstatement. The *Glus* case is therefore not pertinent to this case.

Appellant's cause of action lapsed and the right of action became forever extinguished on July 13, 1964. Estoppel cannot thereafter be applied to revive it.

IV.

The Policy of the Law Is (1) to Apply the Limitation of Liability Act Liberally in Favor of Shipowners; and (2) Not to Apply an Estoppel to Assert a Time Bar When a Party Is Represented by Counsel.

On page 27 of appellant's brief, appellant enlists "policy" as an ally in his cause. He argues there is a policy *against* strict application of limitation statutes. Appellees marshal in opposition the policy *against* applying estoppels to bar a limitation where the party seeking it was represented by counsel, *Kunstman v. Mirizzi,* 234 Cal. App. 2d 753 (1965), and the policy of applying the limitation of liability statute liberally in favor of shipowners.

> *California Yacht Club v. Johnson,* 65 F. 2d 245 (9th Cir. 1933), at 248:
>
> "It is well settled that the law of limited liability is to be construed *liberally* in favor of the shipowner." (Emphasis added.)

Conclusion.

For the foregoing reasons appellees submit that the action filed in Superior Court was a nullity and that the claim filed in the United States District Court is time barred. Wherefore, the decision of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JEROME O. HUGHEY